Future of Family Justice Consultation

9 June 2021

In September 2020, the Minister for Justice Helen McEntee, T.D. established the Family Justice Oversight Group.  The main role of the Group is to identify ways to modernise and improve family justice and people’s experience of the system.

The Group is made up of representatives from the Department of Justice; the Department of Children, Equality, Disability, Integration and Youth; the Department of Public Expenditure and Reform; the Courts Service; the Legal Aid Board; and members of the Judiciary.

A survey was launched in May 2021 to gather experiences and recommendations from stakeholders. There is no option to submit a letter, however there is a section to the survey which allows you to submit large amounts of text, under the heading “Any other comments”. The survey is geared very much towards service users and suggests headings for comments. We have chosen the headings relevant to the NDA’s work and drafted short paragraphs under each.

The survey closes on Friday, 11th June.

## UNCRPD

Ireland ratified the UN Convention on the Rights of Persons with Disabilities (UNCRPD) in March 2018 and is due to submit its initial State Report to the Committee on the Rights of Persons with Disabilities in Q3 2021. The UNCRPD provides the framework to promote, protect and ensure the rights of all persons with disabilities and promotes equal rights in all areas of life. Article 23 of the Convention focuses on respect for home and the family and obliges States Parties to take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships. It states that all persons with disabilities have the right to marry and to found a family, and commits States Parties to ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, and adoption of children.

Article 23 also states that countries should ensure that children with disabilities have equal rights with respect to family life. It confirms that, in all cases, the best interests of the child shall be paramount and obliges States Parties to provide appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.

Under the Convention and with a view to realising these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties should provide early and comprehensive information, services and support to children with disabilities and their families. It unequivocally states that, in no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.

The Convention also requires progressive realisation of the rights of persons with disabilities to access the justice system on an equal basis with all others, most notably under Article 13, which states that

“States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.”

Recent Concluding Observations (commentary and recommendations by the Committee on States Parties’ realisation of the rights contained in the Convention) in respect of Article 13 have included recommendations that States Parties should ensure:

* Procedural accommodation, as well as the use of sign language, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication are in place in all legal proceedings, which would include initial contact with police;
* That justice buildings, courts and tribunals, and police stations, are accessible for persons with disabilities;
* That law enforcement personnel receive regular training about the rights of all persons with disabilities and the obligations of the State party under the Convention;
* That procedural accommodations are in place for persons with psychosocial disabilities.

All members of the Family Justice Oversight Group, including the Department of Justice; the Department of Children, Equality, Disability, Integration and Youth; the Department of Public Expenditure and Reform; the Courts Service; the Legal Aid Board; and members of the Judiciary, are subject to the obligations contained in the UNCRPD.

## Linking family justice and family supports

While the NDA agrees that improving the experiences of families who are involved in a range of court proceedings should be a primary focus of the Family Justice Strategy, it is important to also consider the wider context and, in particular, the factors which may contribute to families being involved in separation, divorce and custody and child care proceedings.

Research highlights that inadequate parental supports result in poorer family outcomes (Nixon, E, 2012, ‘Growing Up in Ireland: How Families Matter for Social and Emotional Outcomes of 9 Year Old Children’. Dublin: Department of Children and Youth Affairs;  Rodriguez, L. et al, 2018, ‘Meitheal and Child and Family Support Networks Final Report: Tusla’s Programme for Prevention, Partnership and Family Support’. UNESCO Child and Family Research Centre).

Irish research has demonstrated the inadequacies in the provision of parental and/or family supports to parents of children with disabilities. An NDA-funded report highlights that prolonged carer stress (that some parents and carers of children with intellectual and developmental disabilities can experience) can lead to increased risk of marital breakdown and family dysfunction (Lafferty, A et al., 2016, ‘Family carers’ experiences of caring for a person with intellectual disability’. Dublin: University College Dublin).

The NDA advises that any Family Justice Strategy should be linked to an evidenced based strategy of supporting families at greater risk of being involved in separation, divorce, custody and child care proceedings.

## Child care, protection and welfare (i.e. cases involving Tusla)

Research commissioned by the Office of the Children’s Ombudsman has noted that a high proportion of children taken into the care of the state under the Child Care Act 1991 are children with disabilities (Moloney, C. et al, 2021, ‘Mind the Gap: Barriers to the realisation of the rights of children with disabilities in Ireland’ Centre for Disability Law and Policy, NUI Galway).

However, the different legislative, policy and service provision systems for child care and children’s disability services has proved problematic in meeting the needs of this group of children. High profile cases such as the ‘Grace’ and ‘Molly’ cases demonstrated the current shortfalls in cooperation across the child care system and disability service systems. While a protocol between the HSE and Tusla was agreed in 2017 and joint staff workshops have taken place, a 2020 review by the OCO found that significant progress in interagency working is still required (OCO, 2020, ‘Molly Two Years On: Have Tusla and the HSE delivered on commitments to children with a disability in the care of the State?’).

The Child Care Law Reporting Project has highlighted that children with disabilities are significantly more likely to be in residential care centres than other children in the child care systems. The report suggested that children with disabilities may experience more placement breakdowns because foster carers may have no experience of children with disabilities and are not adequately supported to meet their needs (Coutler, C., 2015, ‘Final Report Child Care Law Reporting Project’ Dublin: Child Care Law Reporting Project).

A concern also remains in relation to the placement of children with disabilities into residential disability services, as such placements are not covered by the Child Care Act 1991. Therefore, such placements are not subject to the same oversight as placements of other children in other forms of residential care.

## Parents with Disabilities

The Childcare Law Reporting Project published a statistical overview of family court cases in 2015. The single biggest factor leading to care proceedings in these cases was the mental health of one or both parents, usually the mother, which featured in 28 of the case reports, almost 10 per cent of the total (300 case reports in total). A cognitive disability on the part of the parent, again usually the mother (the majority of the parents in these proceedings are parenting alone), featured in 22 cases, almost 7.5 per cent. This is likely to be an under-representation, as in some cases where alcohol abuse, drug abuse or severe neglect dominated the proceedings, undiagnosed cognitive disability was likely to have featured also. What many of these cases highlight is the lack of availability of suitable and appropriate services for vulnerable parents. Parents with mental health problems, cognitive disabilities, from minority ethnic groups, parents who are or recently have been in care themselves, parents who are addicted to drugs or alcohol, parents struggling with a child with mental health problems, all require appropriate and targeted support services, which may, in turn reduce the risk of contact with the justice system.

A further issue highlighted in the Childcare Law Reporting Project report is the capacity of parents with mental health difficulties to engage in court proceedings or to consent to voluntary care where this occurs. There was limited evidence of such parents receiving assistance in engaging in the legal proceedings.

As stated above, a significant proportion of the cases concerned mothers with cognitive disabilities. However, there does not seem to be a structured approach to diagnosis of these cognitive disabilities, and the report frequently features cases where the issue of a parent’s cognitive ability arises in the middle of the hearing. Parenting capacity assessments are sometimes carried out before cognitive assessments, and if account is not taken of a person’s cognitive capacity they will be likely to fail a conventional parenting capacity assessment. On other occasions, a report on cognitive ability was referred to that was many years old and had been conducted prior to the individual becoming a parent. With the introduction of the preliminary hearings under the Criminal Procedure Bill 2021 for criminal justice cases, the NDA advises that it would be timely for family courts to explore options around the introduction of a similar process.

In the past, the State’s approach to capacity has been heavy-handed, in that it applies a blanket policy to whether or not a person has capacity to make decision, often based on a person’s disability or age. With the enactment of the Assisted Decision-Making (Capacity) Act 2015, a more nuanced, functional approach to assessment of capacity is being introduced. This new approach (which will be commenced in mid-2022, along with the rest of the legislation) will be focus on the specific decision that must be made and the time it must be made at. The NDA advises that assessments of parenting capacity follow this functional approach.

## Domestic Violence

There is a considerable body of evidence that shows that violence and abuse are serious problems for persons with disabilities, and that they are at greater risk than non-disabled persons. In the case of domestic violence or abuse by an intimate partner, Irish data (National Disability Authority (2008) Abuse of people with disabilities: Briefing paper by the NDA) shows that adults with certain disabilities were 2.9 times more likely to have experienced such abuse than other adults. Twice as many adults with disabilities had experienced severe abuse compared with other adults. People with disabilities living in residential services may be exposed to higher risks in the absence of appropriate safeguards. Barriers such as inaccessible disclosure and reporting mechanisms should be removed, and information should be produced in a range of accessible formats, including any information campaigns run in relation to services and supports available. Providing for the empowerment of persons with disabilities to come forward is in line with Article 16 of the UNCRPD, and all communications around supports for victims of domestic violence should be in accessible formats, for example Easy-to-Read or Irish Sign Language.

## Intermediaries

In 2020, the NDA published an independent advice paper on the use of intermediaries in the criminal justice system. The NDA’s advice paper defines an intermediary as a professional with skills in communication, whose role is to facilitate communication during the police investigation and at trial between a person with significant communication difficulties and others in the justice system.  The coincided with the O’Malley Review of Protection for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences. Both the NDA paper and the O’Malley recommendations encourage the use of an intermediary- a special provision with a legislative basis in the Criminal Evidence Act 1992- in cases where a person giving evidence has communication difficulties. These difficulties could arise from a number of factors, including age and disability. There have been instances of intermediaries assisting children to give evidence in court cases in Ireland, however this remains an ad hoc practice. If the modernisation and improvement of the family justice system is to adopt a person-centred approach, then availability and regulation of an intermediary to facilitate accurate testimony is crucial.

## Court processes and documents

In order to provide an accessible and inclusive justice system, court process should be flexible and allow for approaches that provide support and assistance to those attending. This may include advocates, or shortly, decision-making supporters under the Assisted Decision-Making (Capacity) Act 2015. It is important that members of the Courts Service and judiciary receive appropriate training on this legislation and the role and functions of decision-making supporters- one of which is to assist a person in court. The NDA published guidance for Justice Professionals in communicating with people with autism in 2018. The short, practical guide was developed in consultation with a range of stakeholders as it was recognised that there was a need for guidance to support understanding of autism in the justice sector. The guide provides background information about autism spectrum disorders and aims to assist those working in the civil and criminal justice system, on how to communicate with and support people who have autism. This includes public service officials such as An Garda Síochána, the Courts Service, the judiciary, the Prison Service, the Probation Service and members of the legal profession such as solicitors and barristers.

It is equally important that all relevant documentation is made available in accessible formats. The NDA’s Customer Communications Toolkit for the Public Service - A Universal Design Approach, has guidance to inform the design and procurement of customer communications across the Public Service (http://universaldesign.ie/Products-Services/Customer-Communications-Toolkit-for-the-Public-Service-A-Universal-Design-Approach/).

The NDA welcomes initiatives by the Courts Service and judiciary to make the courts more ‘user friendly’ and less intimidating for children and persons with disabilities, for example by judges and barristers removing wigs and robes in certain cases and the option of giving evidence via video link.

## Obligations under the Irish Sign Language Act 2017

Under the Irish Sign Language Act 2017 (ISL Act), a person may use Irish Sign Language (ISL) in any court, including the family court. Courts must now provide ISL interpretation for any person competent in ISL who cannot hear or understand English or Irish when they are appearing in or giving evidence in courts (if that is the ISL user’s choice). The ISL Act also states that the courts must not engage an interpreter that is not an accredited ISL interpreter (accredited under the Register of Irish Sign Language Interpreters), and that interpretation must be provided at no cost to the ISL user. Recent feedback to the NDA from a public consultation on ISL access in family courts indicates that the family court is noted to already act in good faith by providing interpreters. This is acknowledged and welcomed, and the ISL Act will therefore reinforce existing good practice.

A few key points to note regarding good practice in the provision of interpreters to ensure appropriate and fair proceedings in the family court include:

* A published procedure should be available to the public, ISL users and solicitors outlining how to request ISL interpretation for proceedings and who is eligible (an ISL version of this information would also ideally be made available)
* A complaints process available through ISL should be available to enable ISL users to raise concerns with processes
* Where proceedings involve two or more deaf parties, each party should have their own interpreter
* Interpreters should be provided with sufficient information about the case prior to interpreting, in order to optimise interpretation quality. Public feedback indicates that some courts raise GDPR concerns about this, however, with appropriate confidentiality agreements in place, this can be achieved and it is important to recognise the importance of a well-prepared interpreter for the provision of high-quality interpretation.

## An Garda Síochána

An Garda Síochána are often the first port of call for arising issues in the community and the NDA advises appropriate disability awareness training for all members of An Garda Síochána, so that they are properly equipped to react to all issues and the people raising them. The NDA is a member of Strategic Human Rights Advisory Committee (SHRAC) and continues to be impressed by the ambitions and approaches of the SHRAC, as well as by its openness to hearing about the diverse needs of people engaging with Gardaí. We welcome progressive initiatives carried out by the Gardaí, including the review of their custody risk assessment forms, to account for different disabilities and vulnerabilities, and pilots carried out by two Garda stations to provide services through Irish Sign Language.

The NDA stresses the importance of a bias-free approach being taken by An Garda Síochána, to ensure that all individuals- including children and persons with disabilities- receive the required supports and services.

Under the National Disability Inclusion Strategy, An Garda Síochána is responsible for make its services and information accessible to, and supportive of, people with disabilities. This action could include initiatives to ensure communications are available in different formats (for example, Plain English and Easy to Read), that websites meet the accessibility requirements under the Web Accessibility Directive, that persons with disabilities can physically access Garda stations and, again, that members of An Garda Síochána receive appropriate disability awareness training.

An Garda Síochána also play a vital role in recording evidence and enabling reporting for ISL users in cases of domestic violence and child welfare. Public feedback provided to NDA in relation to access to services through ISL indicates room for improvements in this regard in relation to:

* Reporting: Consistent processes and awareness in frontline staff to ensure ISL users are able to report such matters in ISL are needed. It should also be noted that children – who may sometimes use parents as interpreters – have a right to be provided an interpreter of their own under the ISL Act. Attention should also be paid to enabling ISL users to nominate a list of preferred interpreters to improve the perceived safety of reporting sensitive family matters.
* Interpretation for victims: Accredited, independent interpreters to support fair process. Public feedback indicates that victims of crime are often dealt with by unqualified interpreters or use family members when interacting with the Gardaí. Using non-accredited interpreters creates a risk to the accuracy of recorded statements, and use of family members to interpret can impact the perceived confidentiality of full reporting in the case of family violence or safeguarding issues.
* Interpretation for defendants: Accredited, independent interpreters to ensure the robustness of the case. Information from the NDA consultation with the ISL community recorded some examples in relation to courts in general, in which court cases were thrown out due to lack of adequate interpretation for a defendant in custody.

## Participation of service users

Article 4(3) of the UNCRPD obliges States Parties to ensure the effective participation of persons with disabilities in the creation and implementation of policies and legislation that impact their lives. The NDA strongly encourages effective and meaningful engagement with service users- including disabled persons’ organisations, persons with disabilities and children- throughout the process of modernising and improving the family justice system.

## Collection and dissemination of data

Finally, the NDA has a particular role to strengthen and promote the collection of data and statistics relevant to people with disabilities, and to ensure public data can be disaggregated using disability as a variable. We have been working closely with colleagues across a number of departments to promote improved data collection processes and we have been pleased to see recent improvements and developments. The NDA would like to take this opportunity to highlight the importance of the collection and dissemination of relevant data under the new Family Justice Strategy. This information can then inform and guide future decision-making and service design.